



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 1 OF 2019

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 10, 22, 26, 43, 47

AND 50 OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF: SECTION 4 AND 5 OF THE FAIR ADMINISTRATION ACT NO 4 OF 2015

AND

IN THE MATTER OF: SECTION 71 OF THE WILDLIFE (CONSERVATION

AND MANAGEMENT ACT) NO. 47 OF 2013

AND

IN THE MATTER OF: BAN FROM ENTERING TSAVO EAST NATIONAL PARK

FOR A PERIOD OF ONE YEAR DATED 21ST DAY OF DECEMBER 2018

AND

IN THE MATTER OF: PRINCIPLES OF NATURAL JUSTICE

AND

IN THE MATTER OF: PRINCIPLE OF LEGITIMATE EXPECTATION AND PROPORTIONALITY

BETWEEN

HILAL MASOUD.....PETITIONER/APPLICANT

VERSUS

THE DIRECTOR KENYA WILDLIFE SERVICE.....1ST RESPONDENT

WILSON K. NJUE, SENIOR WARDEN

TSAVO EAST NATIONAL PARK.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

Mr Obaga for the Petitioner

Mr. Lutta for the 1st and 2nd Respondent

Ms. Angela for the Hon. Attorney General

JUDGEMENT

Introduction

1. The instant Petition dated 17th January 2019 was filed in court on the 18th of January 2019 and accompanied by a Notice of Motion Application and Affidavit sworn by the Petitioner herein, Hilal Masoud on the 17th of January 2019.

2. The 1st and 2nd Respondent's on 24th January 2019 filed a Notice of Preliminary Objection and Grounds of Opposition to the Petition both dated 23rd January 2019. Additionally, the legal officer for the 1st Respondent, Doreen Mutung'a filed an affidavit sworn on 6th May 2019. The 1st and 2nd Respondents also filed a response to the petition dated 22nd May on 24th May 2019. The 3rd Respondent on its part filed a memorandum of appearance under protest and intimated in court that they would not be taking part in the matter as they were an unnecessary party.

3. The 1st and 2nd Respondents through their advocates subsequently filed their written submissions dated 23rd May 2019 pursuant to the courts directions.

The Petitioner's Case

4. The Petitioner averred that he is business man who has been in the tourism business for a long time engaging in his business diligently in accordance with the law. That on the 21st December 2018, the senior warden Tsavo East national park and 2nd Respondent herein vide a letter referenced as KWS/TE/CONF/3017, issued a ban against him barring him from entering Tsavo east national park for a period of one year on allegations of non-payment of entrance fees without according him the opportunity to be heard. It was further averred that the petitioner even before the impugned ban had already made the requisite payment via Mpesa reference number MH90YJT6QQ.

5. The Petitioner further averred that it was his legitimate expectation that all persons who pay entrance fees are allowed to visit the National Park and he was shocked when he was informed that he has been banned from entering Tsavo East National Park. He failed to understand why the ban was issued against him even after he already paid the requisite fee.

6. It was the Petitioner's averment that the directive was illegal and not founded on any law. That as a consequence, his business was about to come to a standstill.

7. The petitioner averred that this court is clothed with ample powers to grant the orders sought and is endeavoured to protect the rights of the petitioner.

8. According to the Petitioner, his case was founded on **Articles 1,2,10,22(2),26,43 and 50** as well as **Section 71 of the Wildlife (Conservation And Management Act) No. 47 of 2013** which provides that every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing therefrom without undue hindrance.

9. It is on the foregoing grounds that the Petitioner sought:

- a. A declaration that the actions by the respondents on imposing a one year ban from entering Tsavo East National Park against the petitioner from the 21st day of December 2018 is illegal and unconstitutional.
- b. An order that the petitioner is granted unconditional access to the park.
- c. Cost of this petition.

1st and 2nd Respondent's Response to the Petition

10. By their Notice of Preliminary Objection, the 1st and 2nd Respondents averred that the issues raised by the Petition did not disclose any triable issues of gross violation of human rights but rather pertained to a private contract between an individual and an entity hence the Petition was fatally defective and ought to be dismissed in limine.

11. The Respondents further opposed the Petition on the grounds that the Petition did not disclose any triable issues capable of resolution by this Honourable Court; the Petition and the application were not supported by evidence and only disclose a private matter between an individual and an entity which matter the Petitioner is camouflaging as Constitutional issues; the Petitioner's pleadings were not adequate in support of an alleged cause of action claim relating to the alleged resolution of the Constitution against the Petitioner to enable this Honourable Court grant the rulings sought herein; the application and the Petition sought to impede the functions of a statutory body and as such it was frivolous, vexatious and an abuse of Court process and ought to be dismissed in limine; that the Petitioner is on a fishing expedition and that the Petition and application sought to engender an illegality contrary to public policy and judicial practice.

12. In the Replying Affidavit in response to the Petition, it was averred that on the 9th of August 2018 while at Tsavo East National park, the

Petitioner violated the Park's rules and regulations when he drove through his Toyota Cruiser KBQ 723G without paying the necessary required park entry charges. That on reviewing the Park CCTV Footage the management established that the Petitioner had on board two (2) Kenyan citizen adults and four (4) non-resident adults all who had not been cleared to enter the park contrary to the laid down security rules and regulations. These Petitioner's actions violated the Park's regulations to which the Petitioner was fully aware hence sabotaging the Park means of collecting fees which is the principle purpose of the tourism sector. It was also averred that the Petitioner had previously been banned from accessing the Park after committing a criminal offence.

13. A case was made that the Respondents acted within the law in banning the Petitioner from accessing the Park and this Petition as filed had no constitutional or triable issues of gross violation of human rights. That the Petitioner was deliberately misleading the court by failing to disclose the fact that he had been previously banned from the park for flouting the same procedure hence his non-compliance is more of a trend than a coincidence.

14. Against this backdrop it was averred that the Petitioner had approached this honourable court with unclean hands by failing to disclose these material facts hence he is unworthy of the equitable remedies as sought in the petition.

15. According to the Respondents, the instant petition was ill founded in law and couched in global and ambiguous terms and the litany of provisions cited therein did not in any way, shape or form relate to the dispute before this honourable court.

16. It was further averred that no rights were violated since the Respondents interviewed the petitioner together and his witnesses and recorded their statement prior to rendering the decision to ban him from the park for one (1) year.

17. In light of the foregoing legal shortfalls and material non-disclosure it was averred the Petitioners were guilty of approaching this honourable court with unclean hands hence unworthy of the subsequent orders sought in their claim.

The 1st and 2nd Respondent's Submissions

18. Mr. Lutta, counsel for the 1st and 2nd Respondents isolated six issues for determination to wit:

- a. Does this petition meet the prerequisite legal threshold and if so, is the preliminary objection merited?
- b. On merit does the said petition raise any legal triable issues that warrant the attention, interrogation and intervention of this honourable court?
- c. Is the evidence adduced by the petitioner in response to the charges credible and tenable?
- d. Is the evidence adduced by the petitioner in response to the charges credible and tenable?
- e. Is the petitioner guilty of approaching this court with unclean hands?
- f. If the petition is dismissed what are the necessary orders as to costs?

19. On whether the petition meets the prerequisite legal threshold and if so, whether the preliminary objection had merit, it was submitted that a cursory glance of the pleadings filed confirmed that the nature of relationship between the petitioner and the respondent was purely private and commercial in nature. This factual position was corroborated by the contract executed between the petitioner and the respondent permitting him to enter the said park as a tour guide.

20. Citing **Kenya Bus Services vs Attorney General Others Miscellaneous Civil Suit Number 413 of 2005** it was submitted that since the petitioner herein was aggrieved by the actions or decisions of the respondents then his legal recourse lies with the civil and commercial avenues and not this constitutional forum. Flowing from this, it was submitted that the preliminary objection dated 23rd January 2019 was merited and the same should be allowed with costs. Reliance was placed on **Honourable Uhuru Muigai Kenyatta vs The Nairobi Star Publication Ltd HCCC Petition Number 187 of 2017**

21. Submitting that a constitutional petition was not the appropriate forum to redress private disputes, it was submitted that the legal threshold of a preliminary objection had been met and the case cited in this regard was **Mukhisa Biscuits Ltd vs Westend Distributors [1969] E.A. 696**. The court was urged to uphold the preliminary objection and strike out the entire petition with costs.

22. Turning to whether on its merits the said petition raised any legal triable issues that warrant the attention, interrogation and intervention of this honourable court Mr. Lutta submitted that the petition had failed to disclose any constitutional right and the manner in which the said breach occurred. It was submitted that the petitioner had merely rehashed a spectrum of constitutional provisions without either disclosing the manner in which the said rights were violated nor the evidence thereof. That the Petitioner was requesting this honourable court for a continuum of remedies without establishing the connection with either the facts or the alleged breach. It was trite that the petitioner had the inalienable duty to outline the rights which have been violated and the manner in which the alleged violation occurred. Reliance was placed on **Anna Rita Karimi Njeru vs. AG & Other Miscellaneous Application Number 4 of 1979** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance & Others Civil Appeal Number 290 of 2013**.

23. It was further submitted that **Section 107 and 109 of the Evidence Act, Cap 80** clearly states whoever alleges must prove and in this case the Petitioner had failed to adduce any evidence in support of the alleged violation hence the claim should be summarily dismissed.

24. Regarding whether the petitioner established that the respondents violated his rights it was submitted that he had not. That the witness statements appearing on pages 19 and 20 of the Respondent's list of documents clearly show the petitioner and his witnesses were exhaustively interviewed and given the opportunity to state their version of the incident by recording the statements dated 9th August 2018. Thereafter, it was when the respondents proceeded to take action against him for breaching the National Park regulations by failing to remit the entry fees of \$ 208 and Kshs. 2,060 as required. It was further submitted that the case against the petitioner was corroborated by the independent evidence of the park rangers who accosted the petitioner inside th removing into this Court for the purposes of being quashed the decision made by the e park after failing to remit the appropriate entry fees. This is confirmed by their respective witness statements which appeared on pages 13, 14 and 15 of the list of documents. This position was supported by the overwhelming evidence against the petitioner which appeared in the covering report on pages 3-5 of the list of documents. It was hence submitted that the respondents had sufficient evidence to charge the petitioner and granted the petitioner a fair hearing before rendering the verdict to ban him from the park.

25. Counsel went on to urge the court to consider the merits the respondents case since it would be tantamount to encouraging an illegality. This is because a court of law will not issue orders that would sanitise an already illegal act.

26. It was submitted that the decision to ban the Petitioner could not be considered as draconian since the petitioner was only banned from Tsavo East National Park. Therefore, the allegations that he has suffered irreparable financial damage were untenable since he had the discretion to tour any other park in Kenya.

27. Regarding whether the evidence adduced by the petitioner in response to the charges was credible and tenable Mr. Lutta submitted that in his supporting affidavit dated 17th January 2019 the petitioner had annexed a copy of m-pesa statement. Firstly, it was urged, the said document had a disclaimer in fine print at the bottom indicating that the same was not admissible in court unless the petitioner notified the relevant officer. According to Counsel, judging by the casual manner in which the same has been adduced, it was highly improbable the Petitioner followed this process. Be that as it may, Mr. Luta urged, the same document was questionable since it did not in any way indicate the particulars of the account holder. That for purposes of this suit the Petitioner was relying on the seventh transaction which indicates a payment of Kshs.23177 in favour of the respondent. However, a cursory glance of the said transaction indicates the same was initiated on the 20th December 2018 which was close to four (4) months after the he had been apprehended for failing to remit the entry fees of 9th August 2018. Therefore, it is apparent he attempted to sanitise his inactions by paying the arrears which coincided with his official ban commencing on 20th December 2018. Consequently, the court was urged to monitor the demeanour of the petitioner who was willing to engage in perjury for purposes of securing orders in his favour and dismiss his petition with costs.

28. On whether the Petitioner was guilty of approaching the court with unclean hands it was submitted the petitioner had approached this court with unclean hands for failing to disclose material facts relevant to this case. Firstly, it was submitted, he failed to inform the court that he had previously been banned from the park for the same offence. This information is supported by the letter from the respondent dated 13th September 2013 which appears in page 16 of the list of document. By the same token, the petitioner failed to disclose the fact that he was duly interviewed and informed of the nature of allegations levelled against him. In addition, he was given an opportunity to defend himself and even recorded a statement to that effect. Consequently, it was fair to surmise that by withholding this information the petitioner has approached this court with unclean hands hence unworthy of the equitable remedies sought in his pleadings.

29. Regarding the necessary orders as to costs Mr. Lutta submitted **Section 26 of the Civil Procedure Act, Cap 26** provides that costs shall abide the outcome of the event. That were the court to summarily dismiss the petition, the Respondents prayed for costs. Reliance was placed on **Jasbir Singh Rai & others vs. Tarlochan Singh Rai & others Petition Number 4 of 2012.**

30. It was submitted that the petition lacked merit and the same should be struck out with costs.

Analysis and Determinations.

31. I have duly considered the respective parties pleadings and the submissions by the advocates herein and to my mind three issues arise for determination:

- a. Whether the instant Petition met the threshold of a constitutional petition
- b. Whether the Petitioner's rights were violated
- c. Whether the Petitioner is entitled to the reliefs sought

32. Mr. Lutta for the 1st and 2nd Respondents raised a preliminary objection alleging that the Petitioner's petition as framed did not disclose any triable issues of gross violation of human rights but rather pertained to a private contract between an individual and an entity hence the Petition was fatally defective and ought to be dismissed in limine. In essence, the Respondents argument was that the petition did not meet the threshold of a constitutional petition. It therefore behoves this court to make this the entry point of its ruminations on the petition.

33. **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696** established what ought to make up a preliminary objection as:

“ so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit per Sir Law J.A.”

34. **Sir Charles Newbold P.** in the same case stated that:

“A preliminary objection is in the nature of what use to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.”

35. The threshold for a constitutional petition was set out in the case of **Anarita Karimi Njeru vs AG & Others Miscellaneous Application Number 4 of 1979** where the court held:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

36. Discussing the threshold for Constitutional Petitions, the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & Others Civil Appeal Number 290 of 2013** stated thus:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639** holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

(43) The petition before the High Court referred to **Articles 1, 2, 3, 4, 10, 19, 20 and 73** of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.

37. The Petitioner averred that the Respondent had breached **Articles 1,2,10,22(2),26,43 and 50** as well as **Section 71 of the Wildlife (Conservation And Management Act) No. 47 of 2013** which provides that every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing therefrom without undue hindrance. As regards the particulars of the alleged breaches, all that can be surmised from a reading of the Petitioner’s pleadings is that he took issue with the decision to ban him from accessing the park from one year even after he had effected payment of the requisite fees. That the impugned directive was an affront on his socio-economic rights under Article 43; the decision had been reached without giving him an opportunity to be heard as guaranteed under Article 50 and an infringement of his legitimate expectation to reasonable access to wildlife resources and to enjoy the benefits accruing therefrom.

38. However, by the Petitioner’s own admission, his entry into the park was facilitated by flouting the Rules and Regulations of the Park, specifically, to pay the requisite fees. The Respondents on their part upon conducting investigations where the Petitioner was clearly given a chance to give his side of the story as is evident from the Respondents list of documents, decided to impose a ban on the Petitioner. The Petitioner was in violation of the law as I shall evince in the ensuing discussion and could not therefore claim that his rights were violated by the Respondents. It is clear to me that the Petition does not meet the threshold of a constitutional petition.

39. Be that as it may, the Petitioner did indeed raise a question as to the propriety of the decision to ban him, alleging that it had no foundation in law. From where I sit this ought to have been a matter for judicial review as what the Petitioner is alleging, in essence, is that by banning him, the 2nd Respondent acted in excess of his powers as the decision was not founded in law. It must be remembered however that the remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself.

40. In **Council of Civil Service Unions vs Minister For The Civil Service [1984] All ER 935** Lord Diplock stated thus:

“Judicial review was I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality”, the second “irrationality” and the third “procedural impropriety”

The writ of certiorari will issue from the High court to quash a determination of an inferior tribunal for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or when the determination was procured by fraud, collusion or perjury. Halsburys law of England 4th edition page 150 Digest on civil case law and procedure by Odunga. J page 3100 at 6853 a.”

41. In the instant matter, it is common ground that the Petitioner entered the Park without paying the requisite fees. The Respondents, from the evidence tendered, conducted full investigations, according the Petitioner an opportunity to explain himself and upon finding him culpable elected to ban him. The question that arises therefore is, having found the Petitioner culpable, what course of action should the 2nd Respondent ought to have pursued? The answer is to be found in the relevant Act that relates to the issues herein which in this case is the **Wildlife (Conservation And Management Act) No. 47 of 2013**. The pertinent provisions include **Section 102** of the **Act** which provides:

102. Breach of protected area regulations

(1) Any person who—

(a) **enters or resides in a national park or reserve otherwise than under licence, permit** or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve, as the case may be;

...

(h) undertakes any related activity in wildlife protected areas contrary to the provisions of this Act: **commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment.**

42. Regarding the Powers of the 2nd Respondent, the Act under **Section 110** provides:

110. Powers of authorized officers

(1) An authorized officer may—

(a) **demand from any person the production of an authority, license or permit for any act done or committed by that person in relation to wildlife resources for which an authority, permit or license is required under this Act or under any rules made thereunder;(emphasis supplied)**

(b) require any person found within or outside wildlife conservation areas who has in his possession any wildlife specimen, to produce authority, permit or licence authorizing him to possess such wildlife specimens, where no such proof is produced, arrest and take such person before a magistrate;

(c) search any person suspected of having committed an offence under this Act or of being in possession of any wildlife specimen in respect of which an offence has been committed, arrest and detain the person, seize and detain any baggage, parcel or house being used to carry or hide such wildlife specimen by the person or his agent; or

(d) Search any vehicle or vessel and seize and detain any wildlife specimens in respect of which there is reason to believe that an offence has been committed, together with any tools, equipment, vessels or vehicles used in the commission of the offence:

Provided that the authorized officer detaining the person and seizing such property shall forthwith take the person and the seizure to the magistrate having jurisdiction over the area where the offence takes place within twenty-four hours;

(e) Confiscate any equipment or receptacle placed for purposes of capturing, harming or killing wildlife animals; and

(f) Conduct investigation and undertake intelligence gathering as appropriate on any land, premises, vessels and vehicles to apprehend suspected offenders of this Act. (Emphasis supplied)

(2) Any authorized officer may—

(a) enter any land, premises, vessel, vehicle, aircraft or trailer in order to assess the condition of wildlife thereof or to perform any such other act which he considers necessary in the circumstances;

(b) require the production of, inspect, examine and copy licences, permits, registers, records, management plan and other

documents relating to this Act; and

(c) take all reasonable steps to prevent the commission of an offence under this Act. (emphasis supplied)

43. Nowhere in the Powers highlighted above was the 2nd Respondent empowered to ban the Petitioner from accessing the Park upon being found to have committed an offence. What was within the ambit of the Powers envisioned by the Act was to require the production of the relevant permits and licences upon request, to conduct investigations and to take all reasonable steps to prevent the commission of an offence under this Act. Therefore, having conducted its investigations and found the Petitioner culpable of the offence, the Respondents ought to have followed up by forwarding the Covering Report to the DPP or sought to be delegated with the prosecutorial power envisioned under **Section 107 of the Act** which provides:

107. Prosecutorial powers

(1) The Director of Public Prosecutions may, in accordance with the Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013) and this section, designate special prosecutors to prosecute wildlife offences under this Part.

(3) Notwithstanding the provisions of **subsection (1)**, the Director of Public Prosecutions may, either on his or her own or on application of an authorised officer, delegate his or her prosecutorial powers to such authorised officer to prosecute offences under this Act.

44. It is therefore not clear to this Court what Provisions the 2nd Respondent relied upon when issuing its letter dated 21st December 2018 banning the Petitioner. While the events leading up to the ban were in line with the powers of the 2nd Respondent, the decision to ban the Petitioner was tainted by procedural impropriety to the extent that the Act does not envision such a scenario. In the circumstances therefore, it is my finding that Respondents acted beyond their mandate. The appropriate procedure would have been to prosecute the Petitioner rather than ban him. It is also of note that the Petitioner alleges that he did end up paying the requisite fees, albeit after the commission of the alleged offence and in a bid to sanitize his actions. There was a departure from the essentials of the law provided in the statute on the right cause of action to take after compounding the case file against the petitioner. What is not provided for in the Act is placing the 2nd respondent on the pedestal of a court or independent tribunal rendering a binding decision

45. Against the backdrop above, it is clear that while the decision contained in the letter dated 21st December 2018 did not reveal any violation of the Petitioner's rights as alleged, it did reveal a case of procedural impropriety in decision making. Such a decision cannot be left to stand. Accordingly and subject to what I have stated hereinabove, the order which commends itself to me and which I hereby accede to is one to quash the said decision by the Respondents by invoking this court's powers as contemplated under **Article 23(3)(f)** and issuing a writ of certiorari against the impugned decision. In **Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 Of 1996**, the Court of Appeal in Kenya in exploring the scope of judicial review said of certiorari that:

“CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons

It's my view given the wording of the applicable Act in this petition under the terms regulating permits and licences the impugned directive was unfair and voidable. **See Patrick Ogola v R2016 ekkr**. Drawing from the parallel provisions under section 7 of the Fair Administrative Action Act 2015 the entrenched minimum judicial review grounds affords the petitioner relief within the writ of certiorari. Thus the KWS acted in excess of jurisdiction depriving the petitioner of his right to access to justice before an independent and impartial tribunal as articulated under **Article 50 (1)** of the constitution. This court must therefore invoke inherent powers in terms of **section 3A** of the civil procedure Act and **Article 23** of the constitution to ensure the blatant breaches of the wildlife conservation management Act which are of fundamental nature are not wished away without a remedy. .

46. In the upshot, the following orders obtain:

a. An Order of Certiorari shall remove into this Court for the purposes of being quashed the decision made by the 2nd Respondent and contained in the letter dated 21st December 2018 referenced as KWS/TE/CONF/3017 banning the Petitioner from accessing the Tsavo East National Park for a period of one year.

b. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 17TH DAY OF JULY 2019

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R NYAKUNDI

JUDGE